Initiative and Referendum and recall of Judges, criticised and condemned.

By Fred. A. Baker.

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THE INITIATIVE AND REFERENDUM AND RECALL OF JUDGES

CRITICISED AND CONDEMNED.

REPRESENTATIVE LEGISLATION EXPOUNDED AND DEFENDED.

A UNITED STATES STATUTE ON THE SUBJECT ADVOCATED.

By

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The initiative and referendum is the most insidious, vicious, and unconstitutional proposition ever brought forward in the entire history of democratic institutions and representative government.

A meeting of the people themselves, or of their representatives immediately and directly elected by them, in a deliberative assembly, is absolutely essential to any exercise of the power of taxation or of the power to enact, amend, modify or repeal a law; that is to say, there must be a meeting or assembly, by whatever name it may be called, at which the proposed tax or law can be considered, discussed, amended, adopted or rejected.

To levy a tax or enact a law by an initiative petition and a referendum, with each voter expressing his opinion in isolation, and without a legislative assembly at which the opponents of the measure can be heard and their objections and arguments considered, and the amendments and modifications of both friends and foes passed upon, would make

any democratic or republican form of government ineffective and abortive or tyrannical and self-destructive. It would prevent the electorate from acting with that full information necessary to the exercise of a sound judgment and discretion; it would cut off all the right of the minority to be heard, and permit the mere numerical majority to impose their ill-considered views upon the whole people, regardless of their interests and welfare; it would carry the mere counting of noses to such extreme and absurd limits as to make democracy and representative government tyrannical, oppressive and odious; and it would finally result in disorder and anarchy, and a return to a military dictatorship or a monarchy with more or less of despotic power.

In the United States we have a congress, the lower house of which is composed of representatives directly elected by the people, and all revenue bills must originate in that house.

In each state we have a legislature, one branch of which at least is elective; in counties we have a board of supervisors or county commissioners, who are directly elected; in cities and villages we have councils or boards of trustees elected by the people; and in townships we have town meetings in which are assembled the electors of the township, and town boards or select-men elected by the people; and school districts and other taxing districts are organized in the same way.

This is representative government as it exists in the United States.

The people of England struggled from the Norman conquest, 1066, to the revolution of 1688, or for over six hundred years to establish the principle of representative taxation and legislation, and it took another century and the revolutionary war, to firmly plant the doctrine in America.

In Anglo-Saxon a meeting was called a gemot; hence scirgemot, or meeting of the shire or county; burhgemot, a meeting of the burgers; wardgemot, a ward meeting in a town corporate; halimot, a meeting of the tenants in the hall of a manor; and witenagemot, a meeting of the wisemen or magnates of the kingdom.

After the Norman conquest the substitute for the witenagemont was called the great or common council of the realm, which eventually became the parliament, from parley, to discuss orally.

In America we call our most important legislative bodies constitutional conventions, and our great partizan meetings are national conventions, meaning a convening of delegates, to recommend measures and nominate candidates.

"Caucus" is said to have been derived from a calkers' guild or meetings in Boston, and was applied in derision by the Tories to meetings of citizens, among whom were calkers and rope makers, held after the Boston massacre to protest against the aggressions of the royal troops.

"Assizes," used to designate county courts in England and Canada, is derived from *assidere,* sitting by or together as the jurors do.

In church nomenclature we have the Sacred College for the election of the Pope, from *collegia,* or gathered together. Our own electoral college for the choice of the President has the same derivation, but its functions of deliberation have been absorbed by our national conventions.

Synod is from *synodus,* a meeting; and convocation, chapter, conference, congregation, all mean a church or religious meeting, council or assembly.

We can not have successful popular governments or save our souls in an orthodox way, without these legislative and deliberative meetings.

Chaos cannot be overcome by order, plurality cannot be brought to unity, in any other way.

What kind of success would the barons of England have met with when they demanded Magna Charta of King John, if they had not held repeated meetings, and Archbishop Langton had not dug up the forgotten charter of Henry I, and expounded its provisions as an aid in putting the articles they agreed upon in shape?

What kind of progress would our own revolutionary fathers have made if they had not held innumerable town meetings, county meetings, colonial meetings, and confederation meetings, and how could they ever have agreed on the constitution of the United States if they had not held the Federal convention of 1787?

In a number of leading states, the conventions held to ratify the constitution, were composed of a majority of delegates who were opposed to the constitution, and were only convinced and brought over by argument and debate. If the question of ratification had been left to a popular vote, without a convention, the constitution would not have been ratified by the necessary nine states.

Madison and Hamilton by their published letters in the Federalist were not able to convince their own constituents in Virginia and New York that the constitution ought to be ratified; but when they and their friends met their opponents in deliberative conventions, and in free and open debate, they carried the day. Madison had to overcome the opposition of such distinguished patriots as George Mason and Patrick Henry.

Hamilton had to contend with a convention more than two-thirds of which were opposed to the constitution. George Clinton, the governor of the state and president of the convention, was the leading opponent of the constitution, and he had the support of Yates and Lansing who

had deserted the Federal convention before the constitution was completed. Ratification was only carried by a vote of thirty to twenty-seven, when more persons were absent from the vote than would have been necessary to change the result.

These historical illustrations show the utility of oral debate, and its great superiority over publications in the newspapers.

Two other illustrations:

What would the Republicans who assembled in mass convention under the Oaks in Jackson in 1854, have accomplished if they had made their platform with initiative petitions and had nominated their candidates by a primary election?

What would the Republican party have amounted to in 1860, if their candidate had been nominated in a national primary, and their platform had been formulated by initiative petitions?

No great result was ever accomplished without meetings, debates, conferences, compromises and adjustments, productive of that unity of purpose and of action essential to success. The separate and independent action of each voter, when you come right down to it, is idiotic.

Fortunately the constitution of the United States provides that "The United States shall guarantee to every state in the Union a republican form of government."

This provision was considered by the Supreme Court of the United States during the disturbances in Rhode Island known as Dorr's rebellion and during the more recent controversy in Kentucky over a gubernatorial election, but in both these cases the questions presented were purely political and the court held that if any state should set up a government that was not republican in form it would be the duty of congress and not of the court to overturn it.

If the case from Oregon, now pending in the court, is of like nature, I apprehend the result will be the same. The Supreme Court has no general authority to expound the constitution; it can only do so, in litigated "cases in law or equity arising under this constitution." Madison was very insistent on having the judicial power of the general government so limited.

The question cannot properly come before the Supreme Court until some person resists an attack upon his person or property by or under a tax levied, or a law (like one creating a criminal offense) enacted by an initiative petition and a referendum. When the question is so presented there can be very little doubt about the result. However it is possible the court never will pass on the question until congress has intervened.

Arizona should be admitted to the Union with her constitution as it is, but congress should pass an act invalidating the initiative and referendum not only in that state, but in all other states in the Union, where it has obtained or may obtain a foothold.

The act should be entitled "An act to guarantee to every state in the Union a republican form of government." The body of the act should read substantially like this:

"Sec. 1. In no state in the Union shall any tax be levied or any law be enacted in the state or in any county, township, city or village, or in any other political or taxing subdivision or district thereof, except with the consent and approval, of a legislative body or assembly, consisting of the electors themselves, or of representatives immediately and directly elected by them; and any tax levied or law enacted in violation of this act shall be deemed unconstitutional and void, in all places and in all courts throughout the United States.

"Sec. 2. An independent, impartial and untrammelled judiciary is declared to be essential to constitutional repre-

sentative government, and any state law or constitutional provision providing for the recall of judges, by initiative petition and a referendum, without impeachment or other trial, shall also be deemed in conflict with the constitution of the United States and void."

Such an act would simply put into statutory form, the essential principles, the quintessence, of that representative form of government, it has taken so many centuries of struggle to establish in England and the United States.

We have an exception from the doctrine in the provisional governments of territories, such as now prevail in Alaska and the Philippine Island, but no one pretends that these are representative governments; they are probationary and will soon pass away, as have all others of a like nature, subject to the jurisdiction of the United States.

When the constitution was being framed and ratified Jefferson was in France. Writing to Madison, Dec. 20, 1787, he mentioned the things in the constitution which he liked and those he disliked, being especially strong and instructive in his condemnation of the omission of a bill of rights. Among other things, he said:

"I like the power given the Legislature (Congress) to levy taxes, and for that reason solely, approve of the greater house being chosen by the people directly. For though I think a house chosen by them will be very illy qualified to legislate for the Union, for foreign affairs, etc., yet this evil does not weigh against the good of preserving inviolate the fundamental principle that the people are not to be taxed, but by representatives chosen immediately by themselves."

In the Federal convention Roger Sherman of Connecticut, Elbridge Gerry of Massachusetts and Charles Pinckney and John Rutledge of South Carolina, advocated the election of the members of the first or greater house by the

state legislatures, but the proposition was literally jumped on by George Mason and James Madison of Virginia and James Wilson of Pennsylvania; and Alexander Hamilton of New York, stating a principle which he upheld with unswerving consistency, said: "It is essential to the democratic rights of the community that the first branch be directly elected by the people."

Madison held the popular election of one branch of the national legislature indispensable to every plan of free government.

Wilson said, "The election of the first branch by the people is not the corner-stone only, but the foundation of the fabric."

It never occurred to these wise and sagacious statesmen to preserve democracy by wholly or partially eliminating the house of representatives by putting the initiative and referendum into the constitution.

It remained for the wiseacres of the present generation to invent and urge the adoption of this device to enable the people to save themselves from their own freely chosen representatives, and their own political negligence or incompetency.

The fundamental objection to the initiative and referendum is the fact that it provides for the levying of taxes and the enactment of laws without submitting the proposed tax or law to the crucible and judgment of a deliberative assembly.

Any one person, or a coterie or cabal, can frame a law and circulate initiatory petitions. Those who are solicited to sign can not propose an amendment or listen to an argument against the proposed measure; they must sign or refuse to sign; and it is certain many will sign without knowing or understanding what they are doing, or what really actuates those who go to the labor and expense of

circulating the petitions; that they will get some information from their immediate associates and acquaintances and from the public press is evident.

The newspapers could be relied upon to furnish the necessary information and discussion, if it was not for one thing, and that is the fact that a newspaper presents only one side of public questions, and the greater number of voters take only one paper and many of them do not even read the one they do take. Each newspaper has its own propaganda and frequently misleads rather than instructs. The paper that publishes the arguments pro and con, without interjecting the opinion of its own editors or proprietors is yet to be published. The London Times formerly attempted something of the kind, yet it was known in English politics as the "Thunderer."

The tavern and saloon, and other places, if there are any, where men meet for conversation and social intercourse, may furnish some assistance. When we see our German fellow citizens in a saloon sitting at tables drinking beer, and engaged in spirited and protracted conversation, we are led to believe that this is the one redeeming feature of such places of resort.

It is evident that desultory discussions wherever they may take place are no sufficient substitute for deliberative assemblies proceeding according to parliamentary usages.

The stump speeches of political campaigns are interesting phenomena, but their principal design is to fire the partisan heart. The less a speaker argues and reasons, and the more he declaims and hurls invective at the opposite party, the more popular he is, and the larger audiences he draws. The people like a good theatrical or oratorical performance. Take a bunch of these political spellbinders, and put them in a deliberative body like a house of representatives or senate, and they soon reach their own level of mediocrity.

One good rough and tumble debater and parliamentarian is worth a dozen of them as far as effectiveness and results are concerned.

The pulpit could be of great service and at times is so, but the clergy are more concerned with things spiritual and the salvation of souls; and the most horrible and appalling vice of the human race is religious fanaticism.

The Crusades were the most stupendous folly ever perpetrated by mankind.

Happily, a movement started by William the Conqueror, with his ordinance separating the spiritual and temporal courts, and continued by Henry II. with his constitutions of Clarendon and his famous quarrel with Archbishop Becket has separated the church from the secular government. At all events the people nowhere in America are prepared to make the clergy the rulers of the state.

Where then are we to find deliberative assemblies unless we continue to make use of those we now have?

Why a deliberative assembly?

The reason is plain. In our courts of justice from the highest to the lowest, we have the learned judges and the juries, but associated with these we have a body of trained advocates more or less learned in the law. From this body of lawyers, each litigant selects his champion, and these two engage in a sort of intellectual wager of battle. The facts are fully brought out and the law is dug up, each advocate making the best showing and the most convincing arguments in favor of his client he possibly can. In that way the judge is informed or refreshed as to the law, and the jury are enabled to reach a conclusion as to the facts. The lawyers are a necessary part of the court. You can not well leave them out. All our constitutions secure to accused persons the right to counsel, and if the accused is not able to pay his lawyer, the state does it for him. All

this has been shown by centuries of experience to be essential to a due administration of justice.

The method of procedure in a legislative assembly is precisely of the same nature. Each house of congress or of a state legislature is divided into two or more parties. If a single party has all the membership, that party will divide into two or more factions. Leaders come to the front for each party or faction, and every proposed tax or law is analyzed, dissected, discussed and debated; committees are appointed to investigate, consider and report; amendments are proposed and passed upon; and in that way a final result is reached. The only difference between a court of justice and a legislative assembly is that in the one the presiding judge determines the law, and the jury the facts, while in the other the whole membership are the final arbitrators, and decide by a vote taken of the whole house. In that way taxes are levied and laws passed; bad laws amended or repealed; unjust taxes abolished, and just taxes continued. By this system of legislative assemblies, the laws are being gradually but surely improved and taxation more justly imposed.

The initiative and referendum abandons this refining and clarifying process, and with the recall of judges and other officials reduces all the departments of government, to the ill considered, immature, capricious and odious tyranny of a mere majority of the qualified voters.

Democracy has very great merits, but it also has its limitations and like every human device or contrivance, can be run into the ground and rendered worse than useless.

The voice of the people is not the voice of God except when the people are right. Our real sovereigns are Reason and Justice.

The people cannot secure a just government except by the use of their time-honored legislative assemblies.

They never have and they never will promote their best interests and secure the blessings of a good government in any other way.

The people are sovereign, but they can not hope to reach or attain reason and justice but by legislative assemblies.

The two great fundamental principles of the constitutional law of the United States are mutually and reciprocally dependent on each other.

1. All the sovereign powers of government, legislative, executive and judicative, are vested in the people.

2. The people can only exercise their powers of sovereignity by means of legislative assemblies and independent and untrammelled courts of justice.

Both of these principles are expressly or impliedly to be found in every American constitution. If not affirmatively expressed they are assumed to exist, as the two great and immovable bulwarks of constitutional liberty.

Chief Justice Fuller, speaking for the whole court in a case from Texas (*139 U. S. 449*) said:

"By the constitution, a republican form of government is guaranteed to every state in the Union, and the distinguishing feature of that form is the right of the people to choose their own officers for governmental administration, and pass their own laws *in virtue of the legislative power reposed in representative bodies*, whose legitimate acts may be said to be those of the people themselves; but while the people are thus the source of political power, their governments, national and state, have been limited by written constitutions, and they have themselves thereby set bounds to their own power as against the sudden impulses of mere majorities."

Referring to Daniel Webster's argument in the Rhode Island case, the chief justice said:

"Mr. Webster's argument in that case took a wider sweep and contained a masterly statement of the American system of government, as recognizing that the people are the source of all political power, but that as the exercise of governmental powers immediately by the people themselves is impracticable; *they must be exercised by representatives of the people,*" etc.

In a case from California involving the validity of a telephone ordinance of Los Angeles (*211 U. S. 265*), the court in an opinion by Mr. Justice Moody, said:

"The charter of the city also contains a provision that upon petition of fifteen per cent of the voters of the city any ordinance proposed must be submitted to the people and may be by them adopted. It is said, therefore, that the power of rate regulation might be, in this manner, exercised directly by the electorate at large. It may well be doubted whether such a result was contemplated by the legislature. There are certainly *grave objections* to the exercise of such a power, requiring a careful and minute investigation of facts and figures, by the general body of the people, however intelligent and right-minded. But the ordinance was not adopted in this manner in this case, and it will be time enough for the courts of the states and of the United States to consider, when that is done, whether the objections only go to the expedience of such a method of regulation or reach deeper and affect its constitutionality."

If the court speaks so guardedly about a mere referendum, it is evident that the question of the constitutionality of the initiative and referendum is an open one in the Supreme Court of the United States.

In Michigan it has been decided.

In a case involving the question whether the legislature could vest the legislative power of the city of Detroit in a

board of appointive officers not directly elected by the people, the Supreme Court of the state *(29 Mich. 112)*, in an opinion by Judge Cooley, said:

"I shall assent to the position of the respondents that the common council of a city—I mean a body commonly known by that name, whether in any particular charter so designated or not—is a distinctive and inseparable feature of municipal government under our existing institutions, and cannot be done away with. I shall also agree that to leave it in existence and strip it of its legislative powers is as palpable a violation of the constitution as would be its entire abolition."

If representative government is essential to municipal organization, it must be in a still higher degree essential to state governments.

There is a deeper, and a more profound and conclusive objection to the initiative and referendum. An act of congress or of a state legislature is law only in the narrow and restricted sense of being a written enactment declaring what the congress or the legislature intends and designs the law to be; but it cannot become law in its scientific and strictly accurate sense, if it conflicts with the customs, manners, habits, sentiments and predelictions of the people supposed to be governed by it.

The customary law either suspends or overrides, and defeats all statutory law, not in accord with it. "The written law is victorious on paper and powerless elsewhere." So wrote the late James C. Carter of New York, in his great work on "Law, its Origin, Growth and Function," which was completed a short time before his death, after a long and successful career in which he reached the very highest rank in the legal profession. He gives a number of illustrations, showing how the original statute of uses was turned upside down to bring it into harmony with the long

established customs by which men bestowed their property for the benefit of relatives and others; how the statute of limitations was modified so as not to apply to cases of concealed fraud; how the statutes against engrossing, forestalling and regrating remained a part of the statutes of the realm for over two hundred years, with spasmodic efforts at enforcement, and finally were "repealed in penitential shame;" how prohibitory liquor laws are found impossible of enforcement except in small rural communities, although the use of intoxicating liquors is not a universal custom, but only a widespread practice; how the great constitutional amendments of the civil war and the acts of congress, designed to secure to the negro race the right of suffrage and political equality, have been defeated in the southern states, with the acquiescence of the north, because of the abhorrence of white men to being subjected to negro rule.

He found his more complete illustration in the struggle now going on between the rule of the customary law, which has prevailed from the earliest times, that public highways should be open to the use of the public on terms of equality, and the anti-trust law, which seeks "to make competition and difference in rates the supreme policy, whereas the universal custom requires the suppression of competition in rates, and the preservation of uniformity."

He might have added that the powers conferred on the interstate commerce commission are designed to accomplish the results the anti-trust law was passed to prevent.

His reference to prohibitory liquor laws is particularly applicable to the present situation here in Michigan. The advocates of the initiative and referendum frankly confess, indeed it is their main argument, that they want to enact laws they cannot get the legislature to pass. The legislature is composed of members coming from all parts of the

state, and every conceivable interest is represented. Legislation consists of a series of compromises, modifications and adjustments, and unless a measure can be so framed as to secure the necessary majority in each house and executive approval, it will not have that respect in the minds and hearts of the people, essential to become a law in fact as well as in name.

We have statutes defining and punishing murder, robbery, burglary and other infamous crimes, and being in accord with the feelings and sentiments of the people, they are as a general rule, enforced.

On the other hand we have a statute making the punishment for keeping a house of ill repute, five years imprisonment. It could not be enforced because, for one excuse or another, the juries would not convict. In sheer desperation the prosecuting officers advised the Detroit common council to pass an ordinance prescribing a more reasonable punishment.

A drastic statute never works in practice.

Adopt a prohibitory liquor law in a county and it does more harm than good; it will abolish saloons and hotel bars, but it will increase private drinking, and very many men who voted for the law will violate it without compunction.

Enact a state-wide prohibitory law and it will be equally ineffective. Congress never has, and probably never will pass an act permitting the states to prohibit the importation of intoxicating liquors, and if such an act should be passed and be enforced it would do no good, because the people would then distill or brew their own liquors. All races of men, whether barbarous or civilized have done something of the kind. Our New England forefathers imported molasses from the West Indies, and made rum. Ministers of the Gospel and others able to do so, had a still,

as the inventories of estates on file in the probate courts conclusively show, and nothing was thought of it.

When the British Parliament passed the molasses act, imposing a duty on the importation of molasses, and undertook to enforce it, it caused a perfect uproar in New England, and was one of the causes which led to the revolution.

It is said that the use of liquors has been very much reduced. Some one has figured out that reducing spirits, wine and beer, to the alcohol contained in them, the per capita consumption in the United States has not varied more than a pint from year to year for one hundred and thirty-six years, and is now right where it began. This shows how all prevailing and universal the custom is, and this customary law cannot be overcome by any statutory law that ever has or ever can be enacted, for it has its foundations in a defect and imperfection in human nature, which is there to stay.

The extra-hazardous industrial pursuits of modern invention and civilization are doing more for temperance than any other thing, but it is because the people do not like to ride on a railroad train, or in a street car in charge of a drunken locomotive engineer or motorman. In that way the people are making a customary law more powerful than any statute.

The initiative and referendum proposes to disregard the customs, habits and prejudices of the people, as reflected in their legislative assemblies.

The great conservative party in England proposes a referendum to defeat the measures proposed by the enlightened public opinion of the Kingdom, as formulated and expressed by the popular representative body, the house of commons.

The conservatives hope that the hereditary Lords, by exercising their influence with their tenants and other

ignorant voters, may defeat the demands of the general public as representatively expressed.

The advocates of the initiative and referendum claim that they are the only true friends of the people; that they are especially anxious to have the people rule; but they ought to realize that the people can only make themselves effective and enforce their will by the use of legislative assemblies, which have been their main resort, reliance and weapon for over two thousand years, and will be for two thousand and more years to come.

Some of my readers may be under the impression that the recall of judges has nothing to do with representative government as guaranteed by the constitution of the United States. They are mistaken. If they will examine the bill of rights and the act of settlement passed as the result of the English revolution of 1688, they will see, that it was then settled forever that no tax could be levied or any law be enacted or suspended, or dispensed with, without the consent of parliament, and that coupled therewith are provisions securing the independence of the judiciary.

The act of settlement says:

"That after said limitation (the limitation of the crown) shall take effect as aforesaid judges' commissions be made *Quamdiu se bene gesserint* (during good behavior), and their salaries ascertained and established; but upon the address of both houses of parliament it may be lawful to remove them."

The last clause is the equivalent of impeachment for cause.

Before the act of settlement the Stuart kings of England, under their favorite doctrine of divine right, still held by the Kaiser as king of Prussia, had appointed and removed the judges at their own sweet will and pleasure, with the consequence that the crown controlled the courts.

Notable instances of the subserviency of the judges to the crown, are the final consent of all of the twelve judges, save one, that they would delay a case and consult the king at the request of his attorney general, and the dismissal of the contumacious Chief Justice, Coke, who would only say, that when the case came before him, he would do what a judge ought to do; the case of John Bates, who contested a duty on currants imposed by the King without the consent of parliament; the case of John Hampden, who refused to pay a tax to build ships, levied on the inland counties without the consent of parliament; the case of Goddard against Hales made up to obtain a decision from the judges that the King could suspend an act of parliament without it's consent; and the prosecution of the Seven Bishops for petitioning the King to be relieved from reading from their pulpits a proclamation of indulgence dispensing with a statute.

The act of settlement was passed eighty-seven years before the constitution of the United States was framed, and we find in that constitution a provision that the judges "shall hold their offices during good behavior and shall at stated times receive for their services a compensation which shall not be diminished during their continuance in office."

All of the states, until we reach Arizona, have constitutional or statutory provisions to the same effect, whether the judges are elected or appointed, and hold their offices for life or for a definite term.

The supreme object of all this, is to have one branch of the government especially designed to stand as an insurmountable obstruction to encroachments on the constitutional rights of representative taxation and legislation, or any other constitutional right, by either the executive, the legislative, or a majority of the people themselves, or all of these acting together.

The judiciary are the guardians of the constitution.

A constitutional republic thus safeguarded is the best system of government that has ever developed in the history of institutions.

The learned judges are sometimes a little reluctant to assume the responsibility, but when it comes to the final test they will not be found wanting, at least as long as they are recruited from a bar devoted to the study of constitutional history and law.

The recall would be destructive of the independence of the judges, and an independent judiciary is necessary to preserve representative government.

The people in the enjoyment and exercise of their sovereignty are no more entitled by the recall to influence and control the judges than the king or the parliament of England, or the president or the congress of the United States, or the governor or the legislature of a state, for an independent judiciary is necessary to enable the judges to do homage to the sovereigns and overlords of all—Reason and Justice.

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